Office - Supreme Court, U.S.
FILED
AUG 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 344

HARRY G. ALKER, Jr., *Petitioner*,

v.

GEORGE M. HUMPHREY, Secretary of the Treasury,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN A. RYAN
821 - 15th Street, N. W.
Washington, D. C.
Attorney for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdictional Statement	2
Statement of the Case	2
Statutes and Regulations	6
Summary of Argument	8
Argument:	
1. The granting of continuance is within the discretion of the Trial Court unless there is an abuse of discretion	9
2. Under 5 USC, Section 261, and the rules and regulations thereunder, as well as under basic considerations of due process, appellee could not lawfully disbar appellant without a hearing	15
Conclusion	16
Appendix	1a

TABLE OF CASES

Betts v. Jardine, 139 P. 657 (Calif. App. 1917)	12
Connell v. Long, 32 Ga. 443	12
Cornwell v. Cornwell, et al., 73 App. D.C. 233, 118 Fed. 2d 396	10
Etty v. Middleton, 62 A. 2d 371 (Mun. Ct. D.C.)	10
Garfield v. United States ex rel Spaulding, 32 App. D.C. 158	12
Goldsmith v. Board of Tax Appeals	11
Harrah v. Morganthau, 67 App. D.C. 119, 89 F. 2d 863	11
Hollis v. Watson, 28 Ky. L.R. 550, 89 S.W. 538	13
Phillips v. Ballinger, 27 App. D.C. 46	12
United States ex rel Wedderburn v. Bliss, 12 App. D.C. 485	12

STATUTES AND REGULATIONS

	Page
Administrative Procedure Act:	
40 Stat. 238, 5 U.S.C.A., Section 1009	2
Sec. 10	2
60 Stat. 237	6
1949 Edition, Code of Federal Regulations, Sec. 10.7 (a), (b), (18)	7, 15
July 7, 1884, ch. 334, Sec. 3, 23 Stat. 258	7
5 U.S.C., Sec. 261	9, 15
28 U.S.C., Sec. 1291	2
28 U.S.C., Sec. 1331	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

HARRY J. ALKER, JR., *Petitioner*,

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harry J. Alker, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled case on April 11, 1957.

OPINIONS BELOW

The United States District Court for the District of Columbia granted a summary judgment on May 8, 1956. The Opinion of the United States Court of Appeals is attached hereto as an Appendix.

JURISDICTIONAL STATEMENT

This action was brought under the provisions of Sections 3 and 9 of the Administrative Procedure Act of 1948, 40 Stat. 238, 5 U.S.C.A., Section 1009. The Court below had jurisdiction by virtue of 28 U.S.C. Sec. 1331, and Sec. 10 of the Administrative Procedure Act. This Court has jurisdiction upon appeal to review the judgment below under U.S.C. Title 28, Sec. 1291.

STATEMENT OF THE CASE

Your Petitioner, Harry J. Alker, Jr., a practicing attorney, is a member of the bar of the highest Court of the State of Pennsylvania since 1913. He has been admitted to practice before the Treasury Department since 1920. A renewal card to practice before the Department was issued in 1952.

The Director of Practice, Treasury Department, after the required Preliminary Notice, instituted disbarment proceedings against the Petitioner and filed a Statement of Charges dated December 16, 1953. Petitioner thereupon requested a Bill of Particulars for more specific information in order to prepare properly his defense.

An order was entered, directing that a Bill of Particulars be filed. The Director of Practice thereupon filed more specific charges in accordance with the order of the Examiner. An answer was duly filed to the charges by the Petitioner on February 24, 1954.

A hearing on the charges was originally scheduled for Tuesday, March 16, 1954, but was postponed to March 30, 1954, because March 15 was the return date for the filing of income tax returns and the Petitioner was too busy to adequately prepare his defense. This

hearing was subsequently postponed several times at the request of Francis E. Walter, Esquire, Attorney for the Petitioner. A hearing was finally fixed for May 20, 1954.

On May 17, 1954, Mr. Walter, Counsel for the petitioner, requested a continuance of the hearing in the matter because of the physical inability of the petitioner to appear. Mr. Walter so advised the Examiner by a certificate from a physician setting forth the illness of the Petitioner, and his inability to appear at a hearing. The Examiner then fixed May 20th as the time for the hearing.

The hearing convened and Mr. Edwin Hall II, an associate of the petitioner, appeared and stated that he was present because your petitioner was not able to be present and that his counsel, Congressman Walter, was in Washington. That in support of his motion for a continuance he was offering the testimony of the petitioner's physician and of his dentist (JA 14).

Mr. Hall in support of his motion for a continuance presented Doctor Moore, petitioner's physician, and two of his dentists.

The testimony of Doctor Moore may be summarized as follows (R. 14, 15):

The petitioner had been under his professional care for some eleven years for gastric ulcers which at times of excitement will cause the pylorić end of the stomach to close, so that no food can enter that organ. The petitioner had at the time of the hearing an abscess on his right eye and it also appeared that another abscess was forming. The one abscess had been excised and medication applied, and the petitioner had been ordered to wear a black patch on his eye, also to remain

in his apartment. The petitioner was on a soft diet because of the ulcers and this has caused his teeth to abscess.

That at intervals it is necessary to use a stomach pump on the petitioner when the stomach closes.

Doctor Moore stated that he had advised the petitioner to rest and that he was not well enough to appear in Court or at the Treasury Department to represent clients (Tr. 11). Doctor Moore also testified that the petitioner *could attend a hearing of his case in about sixty days.* Also Doctor Moore's letter of May 18, 1954 was introduced and identified.

Dr. John Jacob Stetzer, Sr., a practicing dentist, testified that the petitioner had several abscessed teeth exuding pus which should be removed. That if said teeth were extracted, the appellant could resume his profession in five or six weeks.

Dr. John Stetzer, Jr., testified that he was a dental surgeon, that the petitioner had several teeth that should be extracted, and that at the time of the hearing his physical condition prevented any extraction. That it would be six or eight weeks after all the abscessed teeth were extracted before the appellant could resume his usual routine.

The Government presented five investigators of the Bureau of Internal Revenue who had evidently been detailed to keep the petitioner under surveillance. These witnesses testified that the petitioner had been in his office, at the Bureau of Internal Revenue, and had attended a calender call at a session of the Tax Court between May 14, and 18; also, that the petitioner also failed to follow his doctor's orders and did not wear a black patch over his infected eye. The Govern-

ment did not offer any medical testimony to rebut the testimony of Dr. Moore and only presented the evidence of the investigators as set out above. In his argument the attorney for the petitioner suggested that the Examiner have his own physician examine the petitioner to determine his physical condition but this suggestion was not accepted. The Examiner stated your petitioner was a sick man (Tr. 100) but denied petitioner's motion for a continuance and ruled that the Government should present its case.

The hearing proceeded without the presence of your petitioner or his counsel, who as stated previously, were not in Philadelphia. Thereafter, both sides submitted proposed findings, conclusions of law, etc., to the Director of Practice.

On February 11, 1955, the Hearing Examiner submitted findings and recommended disbarment (R. 32, 33, 34, 35, 36). Appellant then appealed to the Secretary of the Treasury (R. 8, 9, 10). On January 31, 1956, the Acting Secretary of the Treasury, H. Chapman Rose, affirmed the decision of the Hearing Examiner but granted the petitioner the opportunity for a *further* hearing, provided that within 20 days he (1) made a formal written request for a hearing, (2) consented to the temporary suspension of his enrollment pending *final determination of the administrative proceeding*, and (3) *surrendered his enrollment card until termination of the suspension.* The decision also provided that if the petitioner did not request further hearing in accordance with the three conditions, the recommended decision of the Hearing Examiner would be affirmed and an order of disbarment would be entered by the Director of Practice upon the expiration of the 20-day period. Your petitioner refused to comply with

the condition, and on February 28, 1956, an order of disbarment was signed by the Acting Director of Practice. This suit was instituted on March 1, 1956. On March 2, 1956, a stipulation was entered into between the United States Attorney for the District of Columbia, and petitioner's counsel which provided

> "IT IS HEREBY STIPULATED by and between the parties hereto that pending determination of plaintiff's motion for a preliminary injunction the defendant will give no further notice to the Internal Revenue Service of the decision by the Secretary January 31, 1956, in the proceedings against Mr. Alker, Complaint No. 1050, and will not publish the decision in the Cumulative Bulletin of the Internal Revenue Service or otherwise publish the same." (R. 5)

The Trial Court granted the Government's motion for summary judgment on May 7, 1956, and it is from this order an appeal was taken. The United States Court of Appeals for the District of Columbia Circuit in an order dated May 25, 1956, directed that the aforementioned stipulation remain in effect.

QUESTIONS PRESENTED

1. Whether the trial examiner exercised an abuse of discretion in not granting a continuance to the appellant who was ill and unable to appear in court?

2. Whether the appellant received a fair hearing under 5 U.S.C. Sec. 261 and the rules and regulations thereunder?

STATUTES AND REGULATIONS

The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons,

agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing, suspend and disbar from further practice before his department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner wilfully deceive, mislead, or threaten any claimant or prospective claimant, by word, circular or advertisement. (July 7, 1884, ch. 334, Sec. 3, 23 Stat. 258).

1949 Edition, Code of Federal Regulations:

> Sec. 10.7 *Proceedings for disbarment, suspension, and reinstatement*—(a) *Proceedings for suspension and disbarment.* If an officer or employee of the Treasury Department has reason to believe that an enrolled attorney or agent has violated any provision of the laws or regulations governing practice before the Treasury Department, or if a complaint concerning any enrolled attorney or agent is made to any such officer or employee, he shall promptly make a written report thereof to the attorney for the Government. If any other person has information of such violations, he may also make written report thereof to the said attorney. The attorney and the Committee will treat as strictly confidential the identity of the informant in any case in which the informant is other than an officer or employee of the Treasury Department, unless the informant in giving his information states that his identity and connection therewith are not confidential.

(b) *Rules of procedure.* The Attorney for the Government may, either on the basis of such information or upon his own motion where he has cause to believe that any enrolled attorney or agent has violated any provision of the laws or regulations governing practice before the Treasury Department, institute proceedings for suspension or disbarment against any enrolled attorney or agent, hereinafter called the respondent in this paragraph, by filing with the Committee a statement of charges signed by the attorney for the Government. Subject to the provisions of the Administrative Procedure Act (60 Stat. 237), such proceedings shall be governed by the following rules:

* * * *

(18) *Hearings.* Subject to this paragraph the examiner may determine the time, place, and manner in which hearings shall be conducted; the form in which evidence shall be received; and may adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of suspension, disbarment, and reinstatement cases. Written notice of the time and place of all hearings shall be given the respondent in the manner provided in this paragraph for the service of papers. No hearing shall be held in less than 10 days from the date of service on the respondent of the notice of such hearing, except that the examiner may postpone or adjourn hearings when necessary or desirable, on notice to the parties.

SUMMARY OF ARGUMENT

1. The granting of continuance is within the discretion of the trial court unless there is an abuse of discretion. The trier of the facts must not exercise his discretion arbitrarily or capriciously but in accordance with fixed judicial principles and with a view to promoting substantial justice.

2. Under 5 U.S.C., Section 261, and the rules and regulations thereunder, as well as under basic considerations of due process, the Secretary could not lawfully disbar petitioner without a hearing. The Secretary cannot avoid its statutory obligation of granting petitioner a hearing by stating in its decision that the petitioner will be offered further opportunity for a hearing, provided that within twenty days after receiving decision he makes such application and surrenders his enrollment card to practice until proceedings are terminated.

ARGUMENT

1. The granting of continuance is within the discretion of the Trial Court unless there is an abuse of discretion.

This has always been the rule and it has always been the rule that where an error in the exercise of discretion results in a hardship and injustice that appellate review will be exercised.

The trier of the facts must not exercise his discretion arbitrarily or capriciously but in accordance with fixed judicial principles and with a view to promoting substantial justice.

The Secretary in this case has always conceded that the appellant was a sick man on the date of the hearing, May 20, 1954, but contends that his application for a continuance was not brought in good faith.

The good faith of the petitioner is shown by his offer to submit to an examination by a physician of the examiner's choice. This clearly proves that petitioner's application for a continuance was because of the petitioner's physical condition.

This Court in the case of *Cornwell* v. *Cornwell, et al.*, 73 App. D.C. 233, 118 Fed. 2d 396, stated:

> "Where motion for continuance on ground of plaintiff's illness was denied and judgment entered against her, and motion for vacating of judgment and for new trial were supported by affidavits that plaintiff, who was her own most material witness, was not in condition to be present at trial, and where record failed to show lack of good faith or that injury might have resulted to defendant from a continuance, refusal of motion to grant new trial was error."

In the instant case not only was a certificate from the petitioner's doctor transmitted to the Hearing Examiner, but the physician, Doctor Moore, testified at the hearing that appellant was unable to appear for trial. Also, it has been admitted by the Government that the petitioner was a sick man. This was also conceded by the Hearing Examiner who stated "Mr. Alker is basically a sick man."

There was no showing made that the Government would suffer any damage by continuing the matter until the petitioner's condition improved (R. 25). In *Etty* v. *Middleton*, 62 A. 2d 371 (Mun. Ct. D.C.), where the question was whether the trial court improperly overruled defendant's motion for a continuance, the Court said:

> "and in this jurisdiction it has been held that action on a discretionary matter is subject to appellate review where the error in its exercise is plainly shown and works material hardship and injustice. We think there can hardly be a doubt that material injustice and hardship have resulted from the ruling in this case one of the most important rights of a party litigant—the right to be present at the trial of her case—was taken from

> her, and what followed was not a trial upon the merits but really little else than an ex parte hearing, and it was ex parte because defendant, despite her own illness and the more critical illness of her husband, was denied an opportunity to come into court, confront her accusers and tell her side of the story. It was error to refuse her that opportunity." (citing many cases)

This Court in the case of *Harrah* v. *Morganthau*, 67 App. D.C. 119, 89 F. 2d 863, stated that refusal to grant a continuance because of plaintiff's illness held reversible error, where plaintiff, who was his only witness, was so ill that appearance in Court would probably have resulted in death and there was no showing that continuance would have resulted in serious loss to other parties.

The appellee's argument that the petitioner had many opportunities for a hearing is without merit.

The instant case was first scheduled for hearing March 16, 1954, or one day after the date for the filing of income tax returns. It is obvious that the office of any tax lawyer would be flooded with work at this time, making it impossible to prepare for a hearing of this kind. Also the April dates were set up when petitioner's counsel would be out of the country. This fact necessitated the request for continuance, furthermore only about sixty days elapsed between the time the case was first scheduled and the date when the Examiner denied petitioner's motion.

In the case of *Goldsmith* v. *Board of Tax Appeals*, the Court stated:

> "The Rules of the Board of Tax Appeals provides that the Board may in its discretion deny admission, suspend or disbar any person.

"But this must be construed to mean the exercise of a discretion to be exercised after fair investigation with such *notice, hearing* and *opportunity* to *answer* for the *applicant* as *would constitute due process*. Also see *Garfield* v. *United States ex rel Spalding*, 32 App. D.C. 158; *United States ex rel Wedderburn* v. *Bliss*, 12 App. D.C. 485; *Phillips* v. *Ballinger*, 27 App. D.C. 46." (Emphasis supplied)

In the case of *Betts* v. *Jardine*, 139 P. 657 (Calif. App. 1917) an application for a continuance was made to the trial court, supported by an affidavit averring that the appellant had suffered a stroke of apoplexy. On advice of a physician he visited Europe. The undisputed affidavit indicated that the appellant alone could prove and establish his defense. It was further shown he would return in two months. The Court of Appeals held that the lower court abused its discretion and should have granted the continuance. Similar to instant case, the appellant is the only person who could establish his defense.

In the case of *Connell* v. *Long*, 32 Ga. 443 it appeared that one of the parties was ill and unable to be present at the trial. His attorney advised the court that he could not safely go to trial without the presence and aid of his client. It was held that the continuance should have been granted. The attorney was unable to conduct the examination as he may have done by the aid of his client, who might even have suggested witnesses, who could have contradicted the plaintiffs. Surely, the appellant's presence would be needed in the instant case, he is an attorney and his knowledge of the facts and of the people concerned would be invaluable.

And in *Hollis* v. *Watson*, 28 Ky. L.R. 550, 89 S.W. 538—the court reversed the trial court's order, refusing a continuance, upon the ground that the party was confined to his room by illness and unable to attend, notwithstanding the case had been upon the docket for about four years and had been continued a number of times for the appellant.

The court said:

> "Whatever may have been the grounds of previous continuances, appellant was entitled to be present at the trial of his case, if possible, and was not responsible for the misfortune which had overtaken him which prevented his attendance."

The above cases indicate that the illness of a party which prevents his attendance at the trial is generally considered grounds for continuance, where it appears that his presence is indispensable.

Most authorities examined by counsel for your petitioner wherein the trial court's discretion was sustained denying continuance in matters of this nature, were situations wherein the petitioning party was present in court, and the court's judgment was founded on personal observation.

In the present case the petitioner is a member of the bar. He, his counsel, and his physician reported that he was unable to appear for hearing on the date scheduled. The testimony of the physician proclaimed the severity of his illness. Also the trial examiner refused to have a physician of the examiner's choice examine petitioner.

The petitioner was not present in court. He was presented with the unusual dilemma of a court direct-

ing him to proceed in order to defend himself, and his physician admonishing him that to do so might be fatal. His decision to follow the advice of his doctor would be the decision of any reasonable and prudent man. The arbitrary action of the Trial Examiner should not be countenanced by this court. His ruling should be reversed.

There is nothing in the record challenging the good faith of the physician or dentists or of petitioner's counsel.

The record clearly shows that petitioner's inability to attend trial, and that he alone was the sole, essential and necessary witness to prove the allegation of his response to the Secretary's petition, together with the surrounding facts, and if the continuance was not granted he would be deprived of his day in court. The petitioner had been advised by his physician not to engage in any trials. The testimony further shows that the doctor advised petitioner to wear a black patch on his eye, rest and remain in his apartment.

The fact that the petitioner failed to obey his doctor's orders, does not in any manner impute bad faith to his physician. There is no question but that the petitioner is a sick man, and was a sick man at the time of the hearing. The examiner stated (R. 25):

"Mr. Alker is basically a sick man."

but according to the Examiner, the fact that his illness *might* be permanent prevented him from granting a continuance.

2. Under 5 USC, Section 261, and the rules and regulations thereunder, as well as under basic considerations of due process, the Secretary could not lawfully disbar appellant without a hearing

Petitioner's right to a hearing before he could be disbarred was explicitly prescribed by Congress in 5 USC, Section 261; the statute giving the Secretary of the Treasury the authority to regulate the recognition of attorneys and agents to practice before his department. After conferring that authority, the statute goes on to provide:

> "And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department any such person, * * * ."

The regulations promulgated by the Government thereunder spell out that right. Section 13.1(c) of Circular 230 states that:

> "Proceedings for suspension, disbarment and reinstatement of licensees to practice before the Treasury Department are subject to procedure prescribed in s. 10.7 of Treasury Department Circular 230, Revised (10.7 of this Subtitle)."

S. 10.7 in turn elaborates the procedure to be followed in proceedings for suspension and disbarment and makes such procedure subject to the provisions of the Administrative Procedure Act (s. 10.7(b)).

The Secretary's decision of January 31, 1956 was promulgated without giving your petitioner the opportunity to controvert those charges in a hearing conducted as prescribed by above statute and regulations.

The Government can not avoid its statutory obligation of granting your petitioner a hearing by stating in its decision of January 31, 1956, that the petitioner

will be offered further opportunity for a hearing provided that within twenty days after date he makes such application and surrenders his enrollment card until termination of proceedings.

The offer to afford your petitioner further opportunity for hearing by the acting Secretary tacitly acknowledges the lack of any legal authority for the Government's action. It is a recognition that the petitioner was not afforded the opportunity for hearing as provided by statute. There is no provision for a temporary suspension of a license pending a further opportunity for hearing. The acting Secretary concedes by this statement that the petitioner was not given a fair hearing in the first instance.

As a result, the acting Secretary was compelled to seek another rationale for his denial of appellant's right to a hearing, and he sought to escape from the dilemma by offering the petitioner a further opportunity for a hearing if he would consent to surrendering his card and agreeing to a suspension of his right to practice. But the Government cannot escape from the fact that the petitioner was not given a hearing as provided by statute. The Government cannot escape from the record in this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition be granted.

Respectfully submitted,

JOHN A. RYAN
821 - 15th Street, N. W.
Washington, D. C.
Attorney for Petitioner.